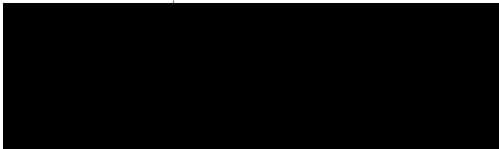




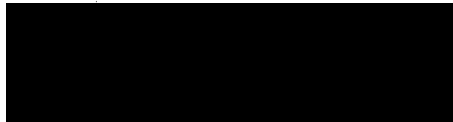
U.S. Citizenship
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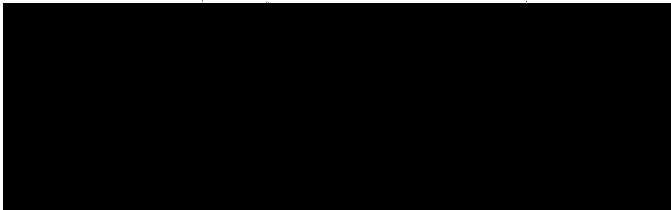
FILE: WAC 02 073 51757 Office: CALIFORNIA SERVICE CENTER Date: SEP 02 2004

IN RE: Petitioner:
Beneficiary:



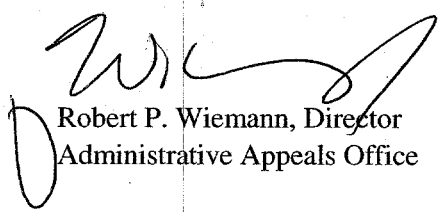
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The director denied the employment-based preference visa petition, and treated an appeal that the petitioner filed as a motion to reopen or reconsider. The director again denied the petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its manager and marketing director. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the proffered position in the United States is not in an executive or managerial capacity; (2) there is no evidence of a qualifying relationship between the petitioner and the entity that employed the beneficiary overseas.

On appeal, counsel submits a brief statement.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it is involved in the restaurant and catering business, and employs three persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is seeking to employ the beneficiary permanently at a salary of \$42,700 per year.

Prior to discussing the reasons for denying the petition, the AAO will address part of counsel's appeal in which she discusses her belief that the denial of the petition involved a procedural error.

According to the record:

1. The director initially denied the petition on August 1, 2002.
2. On September 3, 2002, counsel submitted a timely appeal on behalf of the petitioner.
3. Instead of forwarding the appeal to the AAO, the director treated the appeal as a motion.
4. On November 7, 2002, the director issued a request for evidence (RFE) to the petitioner. The director asked the petitioner to submit evidence that it had the ability to pay the proffered wage. The director stated in the RFE, "This is the only issue that needs to be supported."
5. On March 6, 2003, the director issued a second denial letter. This denial letter was identical to the initial denial letter, dated August 1, 2002.

The AAO concurs with counsel that the director appears to have made a procedural error in treating the appeal as a motion instead of forwarding the appeal to the AAO. Nevertheless, the appeal is correctly before the AAO at the present time, and the AAO will render a decision based upon the record before it.

On appeal, counsel does not directly address either ground for denying the petition. Counsel states only that the facts in this immigrant petition are identical to the facts in the approved nonimmigrant petitions. Counsel states that, unless gross error or changed circumstances have occurred, Citizenship and Immigration Services (CIS) must approve the immigrant petition. Counsel asserts that no circumstances have changed and "given that [CIS] has once renewed the application based on the same facts present here, it would be hard-pressed to claim that it committed gross error twice"

The first issue to be discussed in this proceeding is whether the beneficiary's proposed employment with the U.S. entity is in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When filing the I-140 petition, the petitioner described the beneficiary's job as follows:

[A]s President . . . [the beneficiary] spends approximately one-third of his time in developing and initiating marketing strategies for the corporation, including crepemaking demonstrations throughout the [S]tate. Additionally, [the beneficiary] spends approximately one-third of his time seeking franchising opportunities. He spends an additional one-third of his time managing the restaurant and overseeing its catering staff.

The director was not satisfied with the initial evidence presented. Therefore, in a November 7, 2002 request for evidence (RFE), the director asked the petitioner to submit evidence relating to the beneficiary's proposed duties, including a description of his actual job responsibilities.

In response, the petitioner submitted a copy of a letter that it had provided to the director in order to extend the beneficiary's stay in L-1A status. In this letter, the petitioner generalized the beneficiary's job duties; it did not provide a more detailed description of the beneficiary's responsibilities. The petitioner also submitted an organizational chart. This chart showed the beneficiary as the president of the organization with one chef crepier and one salesperson directly under his supervision.

The director denied the petition because the proffered position is not in a managerial or executive capacity. The director noted that the petitioner's staffing level would not allow the beneficiary to be involved in primarily managerial or executive duties.

Neither the petitioner nor counsel addresses the director's specific comments on appeal. The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. As stated previously, the petitioner is required to furnish a job offer in the form of a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). In the present matter, the job offer that the petitioner submitted fails to clearly describe the beneficiary's job with the U.S. entity. As described by the petitioner, the beneficiary devotes his time to three major areas: developing and initiating marketing strategies, which includes crepemaking demonstrations; seeking franchising opportunities; and managing the restaurant and overseeing its catering staff. While an activity such as developing marketing strategies could be a managerial or executive duty, making crepes is certainly neither managerial nor executive. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. The petitioner lists the beneficiary's duties in major areas, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because a task such as making crepes does not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

More importantly, however, the petitioner's statement regarding the beneficiary's major areas of responsibility does not comport to the organizational structure that it has presented to Citizenship and Immigration Services (CIS). The petitioner stated that the beneficiary spends one-third of his time "managing the restaurant and overseeing its catering staff." Yet, when the director asked the petitioner to submit a chart of its organization, the petitioner stated only that it employed one chef crepier and one salesperson in addition to the beneficiary. The petitioner has not presented any evidence that a restaurant or catering business exists. Neither the petitioner's tax returns nor its payroll records provide evidence that the beneficiary has a restaurant or catering business to operate. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

With only one chef crepier and one salesperson on staff in addition to the beneficiary, the petitioner has not adequately explained how the day-to-day functions of the business get accomplished. If the beneficiary is performing the marketing function, for example, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The absence of evidence illustrating who performs the petitioner's daily business activities does not enable CIS to find that the beneficiary primarily engages in managerial or executive duties. Accordingly, the position offered to the beneficiary is not in an executive or managerial capacity, and the director's decision to deny the petition on this basis shall not be disturbed.

The second and final issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, MAMM SARL of France. Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C), a petitioner must establish that it and the foreign entity share a common relationship.

When filing the petition, the petitioner stated in an accompanying letter, "[The beneficiary] currently holds 100% of the stock in the U.S. corporation." The petitioner did not, however, submit any documentary evidence of its ownership. In a November 2002 request for evidence (RFE), the director asked the petitioner to submit evidence of its ownership including copies of stock certificates, the Articles of Incorporation, and the company's bylaws. The petitioner submitted the requested items; it also submitted copies of its tax returns.

In the denial letter, the director stated that the petitioner failed to establish that SAMM SARL provided the initial capital to buy the petitioner's common stock. The director noted further that the petitioner's tax returns indicated that the beneficiary owned 100 percent of the petitioner's common stock.

On appeal, neither the petitioner nor counsel provides any evidence in rebuttal to the director's comments. The record contains discrepant information about the petitioner's ownership. The director pointed out the problems with the evidence, but the petitioner has declined to explain the discrepancies. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra*. The petitioner asserts that the beneficiary is its owner; yet, it submits a copy of stock certificate number one indicating that MAMM SARL owns 1,000 shares of its stock. This stock certificate is neither dated nor accompanied by a stock ledger. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Accordingly, the petitioner has not established that it and a foreign entity share a common relationship. The director's decision on this issue shall, therefore, not be disturbed.

Beyond the decision of the director, because the petitioner failed to establish that it shares a common relationship with the beneficiary's foreign employer, the beneficiary cannot meet the requirements of the regulation at 8 C.F.R. § 204.5(j)(3)(i)(B). This regulation states that the beneficiary must have been employed by a qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately his entry into the United States in a nonimmigrant status. Although the director did not raise this issue in the denial letter, it is, nevertheless, an additional reason why the petition cannot be approved.

Finally, counsel's sole rebuttal evidence on appeal concerns CIS's responsibility to approve this immigrant petition because none of the circumstances have changed since the L-1A petitions were approved, and because CIS would "hard-pressed" to now claim that it made a gross error in approving the nonimmigrant petitions on two separate occasions.

The director's decision does not indicate whether he reviewed the prior approvals of the beneficiary's L-1A nonimmigrant petitions. However, if the facts in those petitions are identical to the facts in the present matter, then any approval of any L-1A petition on the beneficiary's behalf would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has

not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.